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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. RUSSELL OTIS, Defendant and Appellant.	B222686 (Los Angeles County Super. Ct. No. TA105481) ORDER MODIFYING OPINION AND DENYING PETITION FOR REHEARING [No Change in Judgment]

GOOD CAUSE appearing, the opinion filed March 29, 2012, in the above entitled matter is hereby modified as follows:

On page 5, footnote 2 is deleted.

On page 7, line 15, delete the two remaining sentences in that paragraph that begin, "In both cases it was alleged . . . .," and end " . . .two incidents dissimilar," along with footnote 5, and replace them with the following: "Evidence that a defendant accused of a non-violent sexual offense also committed prior sexual offenses involving force or more serious sexual misconduct has been held admissible under section 1108 where there were sufficient similarities between them.

"The defendant in *People v. McFarland* (2000) 78 Cal.App.4th 489 was convicted of violating Penal Code section 647.6 after he entered a laundromat he frequented,

approached the four-year-old daughter of a woman who worked there, pulled her towards him and stroked her arm. The defendant had previously been convicted of committing lewd acts on minors (Pen. Code, § 288, subd. (a)) in incidents that involved masturbation, fondling, and digital penetration. Although it was error to allow a psychiatrist to give an expert opinion about the defendant's sexually motivated intent in the current offense based upon the fact of those convictions, evidence of the prior convictions themselves was admissible under section 1108, the court held. (*McFarland, supra*, at pp. 494-496.)

"Similarly, the defendant in *People v. Escudero* (2010) 183 Cal.App.4th 302 was accused of violating Penal Code section 288, subdivision (a) after fondling a seven-year-old girl and having her touch his penis. Pursuant to section 1108, the trial court allowed in evidence from two adult women that on separate occasions, the defendant took advantage of them while sleeping and inebriated, digitally penetrating each woman's vagina (a violation of Pen. Code, § 289, subd. (a)(1)(A)) while forcibly orally copulating one of them (a violation of Pen. Code, § 288a, subd. (a)(2)(A)). The *Escudero* court held that even though the current offense involved a minor, while the prior offense involved adult women, the evidence was admissible because in each case the defendant took advantage of his victims when they were asleep and vulnerable. (*Escudero, supra*, at p. 311.)

"As in those decisions, the incident with D.C. was sufficiently similar to what took place with Kevin to satisfy section 1108. In both cases it was alleged that Otis engaged in protracted grooming conduct before attempting any sexual conduct: gifts of cash and clothes, time spent together playing video games or watching television, and an offer to give large amounts of cash as an inducement to sexual contact. Just because the incident with D.C. culminated in completed sexual acts while Kevin walked away instead does not make the two incidents dissimilar. We therefore conclude that the D.C. evidence was properly admitted under section 1108."

[end of modifications]

No change in judgment.

Appellant's petition for rehearing is denied.

BIGELOW, P. J. RUBIN, J. FLIER, J.